

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 31 OF 2020

(Originating from District Land and Housing Tribunal in
Land Application No. 187 of 2017)

SOLOMON THOMAS MMARI.....APPELLANT

(As the administrator of the estate of the late Thomas
Mmari)

VERSUS

REUBEN JOSHUA MOLLEL.....RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant sued the respondent at the District Land and Housing Tribunal over a landed property situated at Koboko Kusini Village at Siha District within the Kilimanjaro region measuring $\frac{3}{4}$ acres. It was the appellant's case at the trial Tribunal that, the suit land was inherited by his father from his grandfather until when the respondent started trespassing thereon. His witness Eliadisia Thomas Mmari (AW2) admitted that their father sold only $\frac{1}{2}$ acre

to the respondent and they witnessed the sale agreement. In rebuttal the respondent claimed to have acquired the disputed land in two phases, first it was $\frac{1}{2}$ acre from the late Thomas Mmari evidenced by the sale agreement (exhibit D1) and second it was $\frac{3}{4}$ at the same area exhibited by the sale agreement (Exhibit D2). His testimony was supported by Samson Augustino Maseri (DW2) the then Village Executive Officer who witnessed both sale agreements. At the end of the contested trial, it was the respondent who was declared the lawful owner of the disputed land. The appellant was dissatisfied and lodged this appeal seeking to impugn the decision of the trial Tribunal on the following grounds:-

1. That the Tribunal grossly erred in law and fact in holding that the respondent is the lawful purchaser and therefore the owner of the suit land.
2. That the Tribunal grossly erred in law and fact in failing to properly evaluate the evidence adduced at the trial and instead chose to gloss over it to justify the decision reached.

This appeal was agreed by both parties to be disposed of by way of written submission of which both parties

complied with the scheduling order to file their respective written submissions.

The appellant in his written submission which was prepared by Mr. Kilasara, Advocate, consolidated both grounds of appeal and submitted that, it was not disputed at the trial court that, the original owner of the suit land and the land adjacent thereto on the Northern and Eastern side was once owned by the late Thomas Mmari. Also, there is no dispute that in November 2005 the deceased sold ½ acre to the respondent as per Exhibit D.1. The appellant submitted that the land in dispute now in issue was never sold to the respondent by the late Thomas Mmari because the deceased before his death was aggrieved by the respondent trespassing therein. The appellant submitted that AW2 denied any involvement in the purported second sale agreement and she had objected immediately at the village level. The land counsel further contended that the testimony was supported by PW3 who is among the people who acquired land from the said deceased.

The appellant submitted that there was no analysis made or reason assigned for disbelieving the appellant and his witnesses' testimonies that the suit land was never sold by

late Thomas Mmari to the respondent. The appellant cited the cases of **Kulwa Balele and Another vs. The Republic (1994) TLR 210** and **Deemay Daati and Two Others vs. The Republic (2005) TLR 132** and proceeded to invite the court to re-evaluate the evidence thereby coming to a just decision.

The appellant's counsel further submitted that, the sale agreement (exhibit D2) does not have any indication that payment was made nor any stamp from the village officer signifying the purported transaction. He contended that the same does not show the name, title, and signature of DW2 who testified to witness the sale agreement. In that regard the sale agreement was fabricated to deprive the appellant ownership of the suit land. Had the trial court properly directed its mind on law and fact, it would have reached a just and reasoned decision that, the appellant is the lawful owner of the suit land. The court in re-evaluating the evidence should be guided by the findings in the case of **Ndizu Ngasa vs. Masisa Magasha [1999] TLR 202**. He ultimately prayed the appeal be allowed with costs.

In the respondent's reply which was prepared by Mr. K.P.S Ndonjekwa, Advocate submitted that, the respondent is

the lawful owner of the land in dispute by virtue of exhibit D.2 measuring $\frac{3}{4}$ acres. He submitted that the exhibit was admitted without objection which implies that it was a legal sale agreement. He cited **section 100 (1) of the Evidence Act Cap R.E 2019** and submitted that, it is not a number of witnesses who are required to prove the case on the balance of probability but it is the credibility of witnesses and the substance of the evidence. He contended that Exhibit D2 was corroborated by the testimony of DW2 that the respondent was a lawful purchaser and the document was not a product of fabrication.

On the issue of misdirection and impropriety of evaluation of evidence by trial Tribunal, the respondent submitted that, the cases cited in support thereof are distinguishable as there was no misdirection by the tribunal in the evaluation of the evidence. He cited the case of **Hemedi Said vs. Mohamedi Mbilu [1984] TLR 113** where it was held that, the person whose evidence is heavier than that of the other is one who must win. He maintained that the evidence was properly evaluated and the honorable Chairperson did not depart from the guiding principle of the law as provided under regulation 20(1)(a)(b)(c) and

(d) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation GN No. 174 of 2003 (R.E 2019). He thus prayed the appeal be dismissed for lack of merit with costs.

I have taken due consideration of the rival submissions and the evidence of the trial Tribunal, this being the first appeal, I am reminded of my primary role as the first appellate court to re-evaluate, re-assess and analyse the evidence on the record and determine whether the conclusion reached by the trial Tribunal holds water or otherwise and give reasons either way. The parties lock horns on one issue that, whether the late Thomas Mmari sold his $\frac{3}{4}$ acre of land to the respondent. It is trite law in evidence that who asserts must prove the case. That burden of proof lies with whoever would want the court to find in his favor in support of what he claims. This was also emphasized in the case of **Abdul-Karim Haji vs. Raymond Nchimbi Alois and Joseph Sita Joseph (2006) TLR 420** where the court held:-

“It is an elementary principle that he who alleges is the one responsible to prove his allegation.”

It is not disputed by either side that the late Thomas Mmari had once sold a $\frac{1}{2}$ acre piece of land to the respondent

as evidenced by exhibit D1. The second sale is now in dispute. The appellant alleged it was fabricated. The evidence of the trial Tribunal captures that, the appellant enjoyed the legal services of Mr. Mushi, Advocate, and when the sale agreement (exhibit D2) was about to be tendered by the respondent he was recorded to have no objection. Furthermore, he did not cross-examine the respondent to the authenticity of either the exhibit nor its contents. In the case of **George Maili Kemboge vs. R, Criminal Appeal No. 327 of 2013, CAT Mwanza registry (unreported)** the Court held that:-

“It is trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence.”

I have painstakingly gone through the two exhibits and discovered that, the first sale agreement (Exhibit D.1) which the appellant had no dispute with; does not disclose the name, title, or stamp of Village Executive Officer to signify the purported transaction. To my surprise, the appellant raises such concern on exhibit D2 while the same was witnessed by the same person. In my view, raising such an allegation at this stage to me is an

afterthought. It is trite law that an issue not raised during the hearing cannot be raised at the appeal stage.

From the foregoing analysis, I find the respondent had proven his case on a balance of probability that he bought the suit land from the Late Thomas Mmari as per exhibit D.2 which was witnessed by DW2 and the sale agreement shows AW2 signed it as a witness of the late Thomas Mmari. I hold the same views as that of the trial tribunal.

Based on the discussion above which caters generally for the two grounds of appeal raised in the appeal, I find no merit and is dismissed with costs.

It is so ordered.




B. R. MUTUNGI

JUDGE

30/11/2020

Judgment read this day of 30/11/2020 in presence of both parties and Mr. Martin Kilasara for the Appellant.


B. R. MUTUNGI

JUDGE

30/11/2020

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI

JUDGE

30/11/2020